Brooklyn Law Review

Volume 67
Issue 4
SYMPOSIUM:
Cognitive Legal Studies: Categorization and Imagination in the Mind of Law. A Conference in Celebration of the Publication of Steven L. Winter's Book, *A Clearing in the Forest: Law, Life, and Mind*

Article 13

3-1-2002

COMMENT: *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels:* How the Fourth Circuit Rocked the Boat

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COMMENTS

SEA HUNT, INC. v. THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS: HOW THE FOURTH CIRCUIT ROCKED THE BOAT*

INTRODUCTION

The mission: to locate a ship that plunged to the bottom of the icy Atlantic over two centuries ago. Another day, another week, another month, and still no hint of the shipwreck. The odds of finding a needle in a haystack seem better. Suddenly, a mechanical device capable of taking moving television pictures illuminates the remains of the shipwreck as it drags slightly above the ocean floor.

Immediately, in an effort to establish rights to the find, the salvage company files the appropriate motions in a federal district court. The court order gives the salvage company the exclusive right to raise the wreckage and its cargo. Under the agreement reached with the state with jurisdiction over the shipwreck's location, the salvage company and the state will each take a percentage of the value of the items salvaged. Most items will end up being sold or donated to museums for display to the world. In the end, many will benefit: the salvage company will receive compensation for its services, the shipwreck will be saved from the further destructive elements of the sea, and a piece of history will be preserved for generations to come.

Suddenly, for the first time in history, the country who owned the ship centuries ago, comes forward and asserts its ownership to the shipwreck. The salvage company's attorney calms his client and says, "Don't worry, the ship has been abandoned by the country, so it no longer has an ownership interest." The attorney then adds, "We have the weight of authority on our side, and at the very least, you'll be entitled to compensation for the salvage services you rendered." The Fourth Circuit recently faced such an issue when it had to decide *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels* ("*Sea Hunt III*").[1]

This Comment examines who holds title to historical, untouched shipwrecks, and whether a salvor is entitled to a salvage award for the time and money spent locating and ultimately salvaging a shipwreck. Part I of this Comment discusses the two common law doctrines, the law of finds and the law of salvage, which control conflicts surrounding historical shipwrecks. Additionally, Part I presents an overview of the Abandoned Shipwreck Act, legislation introduced in 1987 to protect historic shipwrecks as cultural resources. Part II presents a detailed analysis of the *Sea Hunt* decisions. The facts of the case are presented followed by the decisions of the district court and the Fourth Circuit. Part III argues that the Fourth Circuit's conclusion that an implied abandonment standard is improper under traditional admiralty law when an owner appears and asserts ownership to the shipwreck is misleading. Further, Part III urges that Sea Hunt, Inc. was entitled to a salvage award for the salvage services it rendered on the Spanish shipwreck the *Juno*. Finally, Part III answers the crucial question remaining after the Fourth Circuit's decision in *Sea Hunt III*: whether Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain will preclude salvage awards for salvage services on sovereign vessels of Spain.

[1] 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) [hereinafter *Sea Hunt III*].

I. BACKGROUND

A. *The Jurisdiction of Shipwrecks*

The reach of the federal courts extends "to all Cases of Admiralty and Maritime Jurisdiction."[2] This constitutional provision was codified in the first Judiciary Act of 1789 and since then the federal courts have retained jurisdiction over admiralty and maritime cases.[3] Federal court jurisdiction includes "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien."[4]

The law of finds and the law of salvage are the primary vehicles used by the courts to manage conflicts surrounding historical shipwrecks.[5] Although similar doctrines, the determination of whether the law of finds or the law of salvage governs the dispute is critical since each may produce differing outcomes.[6] Thus, some background on each of these doctrines is necessary.

B. *Law of Finds*

The law of finds in the maritime context can be traced back as early as 1861[7] and is still used to decide many modern-

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[2] *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 501 (1998) (quoting U.S. CONST. art. III, § 2, cl. 1) [hereinafter *Brother Jonathan III*].

[3] *Id.*

[4] *Id.* (*quoting* Madruga v. Superior Court of Cal., County of San Diego, 346 U.S. 556, 560 (1954)).

[5] *See* Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, Captain Lawrence, 177 F.3d 491, 498 (6th Cir. 1999) [hereinafter *Fairport III*] (stating that under maritime law, those who wish to raise sunken ships are governed by either the law of salvage or the law of finds); *see also* Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be SB "Lady Elgin," 746 F. Supp. 1334, 1345 (N.D. Ill. 1990) [hereinafter *Lady Elgin I*] (explaining that the law of finds and the law of salvage are the significant elements of maritime law).

[6] *See* Hener v. United States, 525 F. Supp. 350, 355-56 (S.D.N.Y. 1981).

[7] *See* Eads v. Brazelton, 22 Ark. 499 (1861) (involving the salvaging rights over the steamboat *America*, which sank in the Mississippi in 1827. The court stated: "The finder of things that have never been appropriated, or that have been abandoned

day cases involving historic shipwrecks.[8] However, the long-standing principle of "finders keepers" can be found in the non-maritime context as far back as 1722.[9] The common law doctrine of finds treats abandoned property as "returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner."[10] The first finder to lawfully take actual possession or control of the abandoned property acquires title to it.[11] Merely searching for an abandoned shipwreck, or even finding it, does not give the searcher any rights.[12] Any salvor is entitled to search an area for a wreck and to attempt to reduce it to his or her possession, provided he or she is not infringing the rights of other salvors.[13] To gain title to the shipwreck under the law of finds, the salvor must be the first finder to: (1) demonstrate an intent to acquire the property and take actual possession or control of it; and (2) demonstrate that the property was abandoned.[14] Each of these requirements will be considered separately in turn.

The necessity to demonstrate possession was first exhibited in the 1861 case *Eads v. Brazelton*.[15] In that case, Brazelton found a steamboat which had sank in the Mississippi River in 1827.[16] After locating the wreck, Brazelton marked trees on the bank of the river and placed buoys over the wreck to indicate its location, with the intention of returning the next day to salvage it.[17] The next day Brazelton was unable to

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by a former occupant, may take them into his possession as his own property; and the finder of any thing casually lost is its rightful occupant against all but the real owner").

[8] *See* Columbus-America Discovery Gr. v. Atl. Mut. Ins. Co., 974 F.2d 450, 460 (4th Cir. 1992) (stating that the law of finds is being applied to abandoned shipwrecks); *see also* Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) (holding that the salvor was entitled to recovered shipwreck property under the law of finds).

[9] *See* Armory v. Delamire, 93 Eng. Rep. 664 (K.B. 1722) (holding that a chimney sweep who found a lost jewel had title superior to all except the true owner).

[10] *Hener*, 525 F. Supp. at 354.

[11] *See Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) [hereinafter *Treasure Salvors I*].

[12] *See Hener*, 525 F. Supp. at 354.

[13] *See id.*

[14] *See id.* at 356; *Columbus-America Discovery Group*, 974 F.2d at 460.

[15] 22 Ark. 499 (1861).

[16] *See id.* at 502.

[17] *See id.*

return to the site to salvage the wreck.[18] When he did return, he discovered that a firm of wreckers, Eads & Nelson, had located the wreck and had begun raising its cargo.[19] Brazelton asserted rights to the wreck but the court held that he never attained possession of the wreck and was therefore not a finder.[20] The court reasoned that "[t]he occupation or possession of property lost, abandoned or without an owner, must depend upon an actual taking of the property and with the intent to reduce it to possession."[21] The court stated that Brazelton's

> intention to possess was useless without detention of the property . . . . [H]e was not a finder, in that he had not moved the wrecked property, or secured it; he had the intention of possessing it as owner, but did not acquire its corporeal possession; to his desire to possess there was not joined a prehension of the thing.[22]

In addition to possession, abandonment of the property is also required under the law of finds.[23]

There is a great deal of confusion among the courts as to what constitutes an abandoned shipwreck, the second requirement under the law of finds.[24] The principal area of disagreement among the circuits is whether the abandonment of a shipwreck can be inferred from the passage of time or from the owner's inactivity.[25] Courts have generally offered three methods of proof to resolve this conflict: (1) express renunciation of ownership by the owner; (2) implication from an owner's inaction; or (3) passage of time and the lack of an

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[18] *See id.*

[19] *See id.*

[20] *See Eads*, 22 Ark. at 511.

[21] *Id.* at 509.

[22] *Id.* at 511.

[23] *See Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065; *Treasure Salvors I*, 569 F.2d at 337.

[24] *Compare Fairport III*, 177 F.3d at 499-501; Deep Sea Research, Inc. v. The Brother Jonathan, 102 F.3d 379, 387-88 (9th Cir. 1997) [hereinafter *Brother Jonathan II*]; *and Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065 (all three cases held that abandonment may be found when title to the shipwreck has been affirmatively renounced or when circumstances gives rise to an inference of abandonment) *with Columbus-America Discovery Gr.*, 974 F.2d at 461 (holding that a finding of abandonment requires clear and convincing evidence of an express renunciation of ownership; thus requiring express abandonment as opposed to implied abandonment).

[25] *See Fairport III*, 177 F.3d at 499-501; *Brother Jonathan II*, 102 F.3d at 387-88; *Columbus-America Discovery Gr.*, 974 F.2d at 461; *Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065.

identifiable owner.[26] When salvors are unable to establish that the wreck has been abandoned, they usually argue in the alternative that they are entitled to a salvage award under the law of salvage.[27]

C. *Law of Salvage*

Salvage is defined as "compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture."[28] Successful salvors do not acquire title to the salved property but rather obtain a lien upon that property, allowing them to maintain a suit in rem against the vessel or cargo itself for the whole or part of the wreck that was saved.[29] The true owner of the wreck retains title to it until it is abandoned.[30]

The public policy behind salvage awards is to encourage efforts to save property from peril at sea while discouraging dishonesty and embezzlement by salvors.[31] Remuneration for salvage service is meant to serve as an incentive for the risks taken voluntarily by the salvors.[32] To determine the precise amount of compensation courts take several factors into consideration.[33]

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[26] *See* H. Peter Del Bianco, Jr., Note, *Under Water Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 161 (1987) (citing Brady v. The S.S. African Queen, 179 F. Supp. 321, 322 (1960); *Eads*, 22 Ark. 499 (1861); *Treasure Salvors I*, 569 F.2d at 336-37).

[27] *See, e.g.*, *Columbus-America Discovery Gr.*, 974 F.2d at 458; *Lady Elgin I*, 746 F. Supp. at 1339.

[28] The Blackwall, 77 U.S. 1, 12 (1869).

[29] The Sabine, 101 U.S. 384, 386 (1879). The vessel is also referred to as "shipwreck" or "wreck."

[30] *See Hener*, 525 F. Supp. at 356.

[31] *See The Blackwall*, 77 U.S. at 14.

[32] *See id.*; *see also* Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 207 (S.D. Fla. 1981) (stating that the consistent policy behind salvage awards is that salvors will be liberally awarded so to hold out a continuing incentive to undertake the risks associated with salvage operations).

[33] *See The Blackwall*, 77 U.S. at 14. The factors considered in determining the amount of compensation include: the amount of labor expended by the salvor's services; the aptitude, skill, and energy exhibited during the salvage operation; the value of and risk to the equipment used to assist in saving the property; the degree of risk incurred by the salvor during the recovery; the value of the property saved; and the amount of

Three necessary elements must be established before a person can lay claim to a salvage award: the maritime property must be (1) in marine peril and (2) successfully salvaged in whole or in part by (3) the voluntary services of the salvor.[34] Each of these elements merits a brief discussion.

First, to determine if the maritime property is in a state of marine peril, a court must decide whether, at the time of the salvage operation, the ship encountered any damage or misfortune that could result in destruction of the ship if the salvage operation is not undertaken.[35] Many things may constitute marine peril. Threat of storm, fire, or piracy to a ship in navigation are the major forms of peril to which a ship may be subjected. However, this list is not exhaustive.[36] The danger of marine peril does not have to be imminent and absolute; rather, the standard is whether the peril can be reasonably expected.[37]

Success of the salvage is the second element that must be proved in order to claim a salvage award. To satisfy the element of success under salvage law, thus allowing a salvage lien to be imposed, all or part of the salved property must be brought within the jurisdiction of the court.[38] In 1869, the Supreme Court stated that "if the property is not saved, or if it perish[ed], or in case of capture if it is not retaken, no

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danger from which the property was saved. *See id.*

[34] *See The Sabine*, 101 U.S. at 384; Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 n.6 (5th Cir. 1980).

[35] *See* Conolly v. S.S. Karina II, 302 F. Supp. 675, 679 (E.D.N.Y. 1969).

[36] *See Treasure Salvors I*, 569 F.2d at 337. In addition, property actually lost or in danger of becoming lost may also constitute marine peril. *See* Thompson v. One Anchor & Two Chains, 221 F. 770, 773 (W.D. Wis. 1915). In assessing a salvage award for a ship's lost anchor and chains, the *Thompson* court noted that if the anchor and chains could be seen resting on a reef they would be in peril of being lost and the fact that they were actually lost does not diminish or extinguish that marine peril. *See id.* Moreover, even if lost property is discovered it may still be in marine peril due to the actions of the elements of the sea. *See Treasure Salvors I*, 569 F.2d at 337.

[37] *See* Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968).

[38] *See Treasure Salvors I*, 569 F.2d at 334-35; *see also The Sabine*, 101 U.S. at 384 (ruling that the necessary element of success means "[s]uccess in whole or in part, or that the service rendered contributed to such success."); *see also infra* Part I.A. for more on the jurisdiction of shipwrecks.

compensation can be allowed."[39] Indeed, under this traditional approach success was necessary to the claim.[40]

Finally, in order to lay a successful salvage claim, the salvor must show that his or her services were voluntary—not performed under any duty or legal obligation.[41] Under this element of salvage, the court must determine whether the salvor had a preexisting duty to perform the service.[42] It is irrelevant whether the salvor is a good samaritan or a professional only seeking an award because motive will not determine voluntariness.[43] Owners of vessels sometimes have the right to refuse salvage. When an owner is in control and possession of the ship and there are no perils to human safety or risks to property other than the vessel owner's, a salvor who acts without express or implied consent of the owner will not be entitled to a salvage award.[44] However, if the ship is abandoned by her owner, no consent is needed to salvage her.[45] Under such a circumstance, non-consensual salvage under abandonment is permitted when any prudent person would have accepted it.[46]

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[39] *The Blackwall*, 77 U.S. at 12.

[40] *See id.*; *see also The Sabine*, 101 U.S. at 384.

[41] *See* B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 338 (2d Cir. 1983).

[42] *See generally* Mason v. The Blaireau, 6 U.S. 240 (1804) (declining to apply the general maritime policy that denies the crew of a ship salvage awards for claiming salvage against their own ship to a seaman who was the only member of the original crew left on board and who undertook extreme danger to save the ship); Petition of Sun Oil Co., 342 F. Supp. 976 (S.D.N.Y. 1972), *aff'd*, 474 F.2d 1048 (2d Cir. 1973) (finding that the crew was not entitled to a salvage award because they acted out of safety for their own crew and ship rather than voluntarily acting); Sobonis v. Steam Tanker Nat'l Defender, 298 F. Supp. 631 (S.D.N.Y. 1969) (holding that a crew of men were entitled to a salvage award because they acted beyond the scope of their employment and thus met the voluntariness requirement).

[43] *See B.V. Bureau Wijsmuller*, 702 F.2d at 339.

[44] *See* Bonifay v. The Paraporti, 145 F. Supp. 879, 882 (E.D. Va. 1956) (citing Cuttyhunk Boat Lines v. The Pendleton, D.C., 119 F. Supp. 608 (1954)) (holding that salvage services performed without express or implied consent of the owner resulted in no salvage award); F.E. Grauwiller Transp. Co. v. King, 131 F. Supp. 630 (E.D.N.Y. 1955), *aff'd*, 229 F.2d 153 (2d Cir. 1956) (salvor was repeatedly told by vessel owner to cease and thus was not entitled to a salvage award).

[45] *See* Merrit & Chapman Derrick & Wrecking Co. v. United States, 274 U.S. 611, 613 (1927).

[46] *See id.*

D. *Law of Finds v. Law of Salvage*

Once an in rem action has been filed and jurisdiction has been established, admiralty courts must decide whether the law of finds or the law of salvage applies.[47] Title vests in the salvor under the law of finds, while title of the wreck will remain with the owner under the law of salvage.[48]

The law of finds is concerned primarily with title.[49] Under the law of finds "if either intent or possession is lacking, the would-be finder receives nothing; neither effort alone nor acquisition unaccompanied by the required intent is rewarded."[50] Further, if it is decided that the property was not abandoned, the law of finds permits no reward regardless of the effort or level of success in recovering the property.[51]

On the other hand, the law of salvage is concerned primarily with the preservation of property on oceans and waterways.[52] Salvage law grants a possessory interest in the salvor for the purpose of saving the property from destruction, damage, or loss, and it allows the salvor to retain the property until proper compensation has been paid.[53] Unlike the law of finds, a salvor need not have the intention to acquire the property; it is enough that the salvor merely have the intention and capacity to save it.[54]

Moreover, the meaning of "possession" in the law of salvage carries a more relaxed meaning than in the law of finds.[55] A salvor does not need to establish the most secure possession under the circumstances, rather he only needs "a possession secure enough to warrant finding a right to perform service and a right to a just reward."[56] Finally, unlike a

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[47] *See generally Columbus-America Discovery Gr.*, 974 F.2d at 460; *Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1064-65; *Hener*, 525 F. Supp. at 358. In all three cases the court had to determine as a preliminary matter whether the law of finds or the law of salvage applied to the facts in each respective case.

[48] *See* MDM Salvage, Inc. v. Unidentified, Wrecked & Abandoned Vessel, 631 F. Supp. 308, 311-12 (S.D. Fla. 1986).

[49] *See Hener*, 525 F. Supp. at 356.

[50] *Id.*

[51] *See id.* (citing Watts v. Ward, 1 Or. 86, 62 Am. Dec. 299 (1854)).

[52] *See id.*

[53] *See id.*

[54] *See Hener*, 525 F. Supp. at 356.

[55] *See id.* at 357.

[56] *Id.*

potential finder, the salvor receives a payment, depending on the value of the rendered service.[57] Whether a wreck is held to be abandoned is critical in determining which law applies and who owns the ship.[58] Although the law of finds and the law of salvage have been the two primary doctrines governing the disposition of discovered shipwrecks, legislative action has altered this approach.[59] Key legislation affecting this area of the law is discussed in the following section.

E. *The Abandoned Shipwreck Act of 1987*[60]

1. The Need for the Abandoned Shipwreck Act

The purpose of the Abandoned Shipwreck Act ("ASA" or "the Act") is to "vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States and to clarify the management authority of the states for these abandoned historic shipwrecks."[61] The Act was a response to the need to protect historic shipwrecks as cultural resources.[62] There are an estimated 50,000 shipwrecks located within the navigable waters of the United States, and of those wrecks, five to ten percent are of historical significance.[63] The technological boom has made access to these shipwrecks much easier, thereby increasing interest in them.[64] Consequently, these historic shipwrecks were being subjected to multiple use demands, from sport divers with a recreational interest, underwater archaeologists concerned with preservation, and salvors focused on commercial interests.[65] The Act was also drafted in response to the confusion that existed over the

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[57] *See id.* at 357-58.
[58] *See id.* at 356-57.
[59] *See Fairport II,* 105 F.3d at 1081-83.
[60] 43 U.S.C §§ 2101-2106 (2000).
[61] H.R. REP. NO. 100-514, pt. I at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N 365, 365.
[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See id.*

ownership and authority to manage abandoned shipwrecks.[66] Individual states were claiming title to historic shipwrecks located on submerged lands under their jurisdiction, while the federal admiralty courts were also asserting jurisdiction over the wrecks.[67]

In 1953, Congress passed the Submerged Lands Act[68] ("SLA") which transferred ownership of all natural resources and submerged lands, out to a distance of three miles, to the individual states.[69] However, Congress did not specify in the SLA whether states owned non-natural resources such as abandoned shipwrecks located within the states' submerged lands.[70] Despite this lack of clarity, twenty-eight states passed laws pertaining to the management of historic shipwrecks in state waters.[71] However, many states were constrained in applying those shipwreck management and preservation laws due to conflicts with federal admiralty principles and mixed judicial decisions.[72] Under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1333,[73] federal district courts have original jurisdiction over all maritime and admiralty cases.[74] When exercising this jurisdiction the federal courts applied the common law principles of admiralty, which include the law of finds and law of salvage.[75]

Under the law of finds, the finder of an abandoned shipwreck receives title.[76] Under the law of salvage, the owner of the wreck retains title but the salvor may be entitled to a salvage award.[77] However, when faced with salvage claims, a

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[66] H.R. REP. NO. 100-514 pt. I at 2.

[67] *See id.*

[68] 43 U.S.C. §§ 1301 *et seq.*(2000).

[69] *See* H.R. REP. NO. 100-514 pt. II. In Texas, Puerto Rico, and the West Coast of Florida the boundary is nine miles.

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] 28 U.S.C. § 1333 (2000) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all the other remedies to which they are otherwise entitled, (2) any prize brought into the United States and all proceedings for the condemnation of property taken as a prize."

[74] *See* H.R. REP. NO. 100-514 pt. II.

[75] *See id.*

[76] *See Fairport III*, 177 F.3d at 498.

[77] *See The Sabine*, 101 U.S. at 386.

majority of the federal courts concluded that "(1) the SLA did not specifically assert U.S. title to shipwrecks and transfer that title to the states; and (2) state historic preservation laws whose provisions are inconsistent with federal common law admiralty principles are superseded by those principles under the supremacy clause of the Constitution."[78] A minority of the federal courts disagreed and instead held that the SLA did provide states with jurisdiction over shipwrecks in state waters.[79] Congress concluded that these inconsistent federal court decisions had resulted in confusion over ownership of, and responsibility for, historic shipwrecks.[80] This confusion prompted legislation that would eventually become the ASA.[81]

2. Elements of the ASA

The first requirement under the ASA is that the shipwreck must be abandoned for the Act to be applicable.[82] Next, to be covered by the ASA, the abandoned shipwreck must be "(1) embedded in submerged lands of a state; (2) embedded in coralline formations protected by a state on submerged lands of a state; or (3) on submerged lands of a state and . . . included in or determined eligible for inclusion in the National Register."[83] If these requirements are met, the United States asserts title to the shipwreck and thereafter transfers title to the state on whose submerged lands the shipwreck is located.[84]

Of particular importance is § 2106(a) of the ASA, which provides that "the law of salvage and the law of finds shall not apply to abandoned shipwrecks to which Section 2105 of this title applies."[85] Therefore, a finding of abandonment, in the absence of a state law providing otherwise, will leave the salvor

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[78] H.R. REP. NO. 100-514 pt. II (citing Cobb Coin Co., Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981); Treasure Salvors, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978)).

[79] *See id.* (citing Subaqueous Exploration & Archaeology, Ltd., v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 577 F. Supp. 597 (D. Md. 1983)).

[80] *See* H.R. REP. NO. 100-514 pt. II.

[81] *See id.*

[82] *See* 43 U.S.C. § 2105(a) (2000).

[83] *See id.*

[84] *See id.* § 2105(c).

[85] *See id.* § 2106(a).

with neither title nor a salvage award because traditional admiralty law will not apply.[86] If, however, the shipwreck is found not to have been abandoned then traditional admiralty law prevails and the law of finds applies.[87] Thus, the key element is abandonment, as the ASA cannot be triggered without such a finding.[88]

The problem is that the ASA does not define abandonment; and so, while the Act attempts to clarify these shipwreck controversies, it has not been wholly successful due to disputes concerning the standard of proof required for abandonment.[89]

F. *Recent Developments in Shipwreck Law*

On April 22, 1998, the U.S. Supreme Court announced the decision of *California v. Deep Sea Research, Inc.* (*"Brother Jonathan III"*).[90] Deep Sea Research had located the *Brother Jonathan*, a ship that sank off the coast of California in 1865, and sought rights to the wreck under the federal district court's in rem admiralty jurisdiction.[91] California intervened and claimed title to the wreck under the ASA and argued that Deep Sea Research's in rem action was a violation of the Eleventh Amendment.[92] Deep Sea Research countered that the ASA could not divest the federal courts of the exclusive admiralty and maritime jurisdiction conferred by Article III, Section 2 of the United States Constitution.[93] The Supreme Court granted certiorari to address the interplay between federal court admiralty and maritime jurisdiction, the state's Eleventh

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[86] *See Fairport II*, 105 F.3d at 1082.

[87] *See* 43 U.S.C. §§ 2105(a)-2106(a).

[88] *See id.* § 2105(a) (requiring abandonment before any other elemental analysis can take place).

[89] *See Sea Hunt III*, 221 F.3d at 638-40.

[90] 523 U.S. 491 (1998).

[91] *See id.* at 495-96.

[92] *See id.* at 496. California asserted it had title to the wreck either under the ASA or under § 1613 of the California Public Resources Code and claimed that a suit in rem over the wreck was thus prohibited by the Eleventh Amendment. California argued that the under the Eleventh Amendment federal courts must dismiss an action in rem when a state intervenes, so long as the state's claim of title is colorable. *See id.* at 496-97.

[93] *See id.* at 497. *See also supra* notes 2-6 and accompanying text for a discussion of the jurisdiction of shipwrecks.

Amendment immunity, and whether the *Brother Jonathan* was subject to the ASA.[94] The Court held that the Eleventh Amendment does not bar federal court jurisdiction over shipwreck claims falling under the ASA.[95]

The ruling ended the jurisdictional dispute but failed to address whether the *Brother Jonathan* was abandoned and was therefore subject to the ASA.[96] The Court found that the Ninth Circuit had decided the wreck was not abandoned based on jurisdictional concerns; therefore, the Court declined to resolve whether the shipwreck had been abandoned within the meaning of the ASA and instead remanded the case for further proceedings.[97] Although the Court failed to resolve the circuit split over the definition of abandonment under the ASA, it did provide some guidance by recommending that on remand the lower court should find that "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law."[98] Against this backdrop, the Fourth Circuit decided *Sea Hunt III*. Part II presents a detailed analysis of the *Sea Hunt* decisions.

II. *SEA HUNT, INC. V. UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, THEIR APPAREL, TACKLE, APPURTENANCES, AND CARGO LOCATED WITHIN COORDINATES 38 DEGREES 01' 36" NORTH LATITUDE, 75 DEGREES 14' 33" WEST LONGITUDE ET AL.*[99]

The days of scouring the seas for long lost Spanish shipwrecks filled with riches recently received a nasty legal jolt in *Sea Hunt III*. *Sea Hunt* marked the first time in history that Spain laid legal claim to one of its many shipwrecks and prevailed in its legal battle to retain title to the shipwrecks and to refuse salvage activities.[100] This Part discusses the relevant facts of the case, the procedural history, and the court's reasoning.

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[94] *See Brother Jonathan III*, 523 U.S at 500-01.
[95] *See id.* at 507-08.
[96] *See id.* at 508-09.
[97] *See id.*
[98] *Id.* at 508.
[99] 221 F.3d 634 (4th Cir. 2000).
[100] Id. at 647.

A. *Facts*

1. The *La Galga*

Two Spanish naval vessels, the *La Galga* and the *Juno*, sank off the coast of present-day Virginia in 1750 and 1802, respectively.[101] The *La Galga* was commissioned by the Spanish Navy in 1732 and initially served as part of Spain's Mediterranean Fleet.[102] However, from 1736 to the day the ship went down, the *La Galga* served as a convoy escort charged with escorting merchant ships.[103]

On August 7, 1750, the *La Galga*, carrying the Second Company of the Sixth Battalion of Spanish Marines, was directed to escort a convoy of merchant ships across the Atlantic Ocean to Cadiz.[104] Unfortunately, that would be the *La Galga's* last voyage.[105] Eleven days into the journey, the *La Galga* ran into a hurricane near Bermuda.[106] The storm separated the ships and forced them towards the present United States' coast.[107] On August 25, 1750, the *La Galga* sank off the coast of the Eastern Shore near the present-day Maryland/Virginia border.[108] Luckily, most of the crew on board reached land safely.[109]

After the ship sank, the commander of the *La Galga* attempted to salvage items from the wreck but was hindered from doing so due to the pillaging and looting of the ship by local residents.[110] Eventually, the commander was able to obtain the help of the Maryland Governor in protecting the wreck from the pillaging and looting, but before salvage efforts could be resumed a second storm hit and broke apart what was

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[101] *See* Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678, 680-81 (E.D. Va. 1999) [hereinafter *Sea Hunt I*].

[102] *See id.* at 680.

[103] *See id.*

[104] *See id.*

[105] *See id.* at 680-81.

[106] *See Sea Hunt I*, 47 F. Supp. 2d at 681.

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *See id.*

left of the ship.[111] No more salvage efforts took place until approximately two hundred and fifty years later when Sea Hunt, Inc. ("Sea Hunt"), a privately owned shipwreck salvage company, resumed salvage operations on the *La Galga*.[112]

2. The *Juno*

The thirty-four gun frigate, the *Juno*, was commissioned into the Spanish Navy in 1790 where she sailed with a squadron of other ships across the Atlantic to Cartagena.[113] The *Juno* served Spain for ten years, traveling many of the same routes as the *La Galga* in the Atlantic and Caribbean.[114] On October 19, 1802, during a mission to transport the Third Battalion of the Regiment of Africa back to Spain, the *Juno* ran into a deadly storm from which she would not recover.[115] The storm caused the *Juno* to sink, taking with her four hundred and thirty-two lives.[116] Shortly after the ship went down, Spain launched an investigation into the sinking of the *Juno* but it revealed nothing.[117] The *Juno* remained undisturbed at the bottom of the Atlantic for approximately two hundred years until discovered by Sea Hunt.[118]

B. The Parties Involved

After discovering what it believed to be the remains of the *La Galga* and the *Juno*, Sea Hunt filed a verified complaint in admiralty in rem against the two shipwrecks on March 11, 1998.[119] The complaint stated five counts:

> 1) that according to the Abandoned Shipwreck Act, the Commonwealth of Virginia is the rightful owner of the shipwrecks, and Sea Hunt is entitled to the rights granted to it by the Virginia

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[111] *See Sea Hunt I*, 47 F. Supp. 2d at 681.
[112] *See id.*
[113] *See id.*
[114] *See id.*
[115] *See id.*
[116] *See Sea Hunt I*, 47 F. Supp. 2d at 681.
[117] *See id.*
[118] *See id.*
[119] *See id.*

> Marine Resources Commission; 2) that Sea Hunt is entitled to a liberal salvage award for voluntarily recovering artifacts which are in "marine peril"; 3) that Sea Hunt is entitled to an injunction prohibiting other salvors from attempting to recover artifacts from the wreck; 4) that based on information and belief, the two wrecks are the remains of the Spanish frigates JUNO and LA GALGA, and Sea Hunt is entitled to declaratory judgment that Spain may no longer exercise sovereign prerogative over the wrecked vessels; and 5) that Sea Hunt is entitled to declaratory judgment stating that no government other than the Commonwealth of Virginia, including the United States or any foreign sovereign, has jurisdiction to regulate salvage operations over the two shipwrecks.[120]

On March 12, 1998, the district court issued an arrest of the two wrecks and appointed Sea Hunt the exclusive salvor until further notice from the court.[121]

On May 13, 1998, Virginia filed a verified claim asserting that it was the rightful owner of the shipwrecks pursuant to the ASA, and that its rights were being exercised through permits issued to Sea Hunt by the Virginia Marine Resources Commission.[122] Under the permits, Virginia granted Sea Hunt permission to conduct salvage operations and to recover artifacts from the shipwrecks.[123] On May 18, 1998, the United States filed a motion to intervene on behalf of Spain asserting ownership of the two shipwrecks.[124] Moreover, the United States also filed an answer asserting its own interests in exercising regulatory authority over the shipwrecks.[125] However, the district court denied both of the motions filed by

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[120] *Id.* at 681-82.

[121] *See Sea Hunt I,* 47 F. Supp. 2d at 682.

[122] *See id.*

[123] *See Sea Hunt III,* 221 F.3d at 639.

[124] *See Sea Hunt I,* 47 F. Supp. 2d at 682. The United States intervened on Spain's behalf because it believed it had an obligation under the Treaty of Friendship and General Relations between the United States of America and Spain, signed July 3, 1902. *See id.* at 682 n.2.

[125] *See id.* The United States sought to give the National Park Service regulatory authority over any salvage operations off the Assateague Island National Seashore. *See id.*

the United States.[126] Spain obtained counsel and filed a verified claim asserting ownership over the two shipwrecks.[127]

The district court held that Virginia had title to the *La Galga* under the ASA but that Spain retained title to the *Juno*.[128] Under the ruling, Sea Hunt was allowed to continue its salvage operations on the *La Galga* wreck according to the terms of the permit issued by the Virginia Marine Resources Commission; however, Sea Hunt was not allowed, without Spain's permission, to continue salvage efforts on the *Juno*.[129]

C. *The Decision of the District Court*

The district court based its ruling on the Definitive Treaty of Peace Between France, Great Britain, and Spain,[130] the 1763 Treaty that ended the French and Indian War.[131] The district court reasoned that under Article XX of the 1763 Treaty, Spain had relinquished its claim to all its possessions on the continent of North America, to the east and to the south of the Mississippi River, including not only the land but "everything that depends" on the land.[132] In return for ceding to Great Britain all of its possessions in North America, east and south of the Mississippi River, Cuba was returned to Spain.[133] The district court further explained that Great Britain was the clear victor of the War in North America and that the terms of the Treaty implied that Great Britain intended to obtain complete control over all of North America east of the Mississippi River.[134] The district court stated that:

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[126] *See id.* at 683. On September 23, 1998, the district court denied the United States motion to intervene on its own behalf and likewise denied the United State's motion to intervene on behalf of Spain on September 25, 1998. *See Sea Hunt I*, 47 F. Supp. 2d at 683.

[127] *See Sea Hunt III*, 221 F.3d at 638-40; *Sea Hunt I*, 47 F. Supp. 2d at 684.

[128] *See Sea Hunt I*, 47 F. Supp. 2d at 691.

[129] *See id.*

[130] Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, art. 20, 42 Consol. T.S. 331.

[131] *See Sea Hunt I*, 47 F. Supp. 2d at 689-90.

[132] *See id.* at 689 (quoting Definitive Treaty of Peace, *supra* note 130, at art. XX).

[133] *See id.*

[134] *See id.*

> The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA off the coast of Virginia.[135]

The district court also pointed out that the last sentence of Article XX reserved for the King of Spain the right to "cause all the effects that may belong to him, to be brought away, whether it be artillery or other things."[136] The court explained that Spain and Great Britain knew where the *La Galga* was located, and therefore both countries knew that it would be included in the cession of property.[137] However, Spain made no attempt to "bring away" any of the remains of the *La Galga* after the Treaty was signed.[138] This led the district court to conclude that Spain in effect had waived its right to carry the remains away.[139] The district court found that Spain had ceded its rights over everything it owned in North America east of the Mississippi River, including sunken vessels, in the Treaty.[140] Thus, the district court held that Spain abandoned the *La Galga*, and that she therefore belonged to Virginia under the terms of the ASA.[141]

As for the *Juno*, the district court held that because it sank in 1802, several years after the 1763 Treaty, it was not ceded to anyone.[142] The district court considered whether the Treaty of 1819, which ended the War of 1812, constituted evidence of express abandonment of the *Juno* by Spain.[143] The district court concluded that the Treaty of 1819 was more narrow in scope than the Treaty of 1763.[144] The court found that under the 1819 Treaty, Spain ceded only "territories," namely Florida, and not "all that Spain possesses," as in the

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[135] *Id.* at 689.

[136] *Sea Hunt I*, 47 F. Supp. 2d at 689 (quoting Definitive Treaty of Peace, *supra* note 130, at art. XX).

[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] *See id.*

[141] *Sea Hunt I*, 47 F. Supp. 2d at 690.

[142] *See id.* at 689-92.

[143] *See id.* at 690-91.

[144] *See id.* at 690.

1763 Treaty.[145] Moreover, the court noted that the 1819 Treaty described territory "Eastward of the Mississippi," similar to the 1763 Treaty, but the 1819 Treaty also clarified that the territory being described was only that "known by the name of East and West Florida."[146] The district court concluded that since the *Juno* was located off the coast of Virginia, the 1819 Treaty did not affect it.[147] Thus, the court held that Spain did not expressly abandon the *Juno* under the 1819 Treaty.[148]

Furthermore, the district court also considered the effect of the declaration of war between Spain and the United States in 1898. The court held that Spain had not expressly abandoned the *Juno* under the declaration because the United States would have had to obtain actual control over the *Juno* to warrant a wartime confiscation of an enemy vessel.[149] Since that never occurred, the district court held that the *Juno* was not expressly abandoned and therefore Spain retained title to it.[150]

With respect to Sea Hunt's claim for a salvage award for its salvage efforts on the *Juno*, the district court expressly reserved that judgment pending supplemental briefs.[151] The district court ordered such filings because Spain indicated that it wished to treat the *Juno* wreck as a maritime grave and did not want the vessel to be salvaged.[152] The district court later denied Sea Hunt the right to claim any salvage award because Spain, the owner of the *Juno*, had expressly refused salvage services.[153]

Spain appealed the district court's decision concerning the *La Galga*. Virginia and Sea Hunt cross-appealed with regard to the *Juno* and the denial of a salvage award.[154]

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[145] *See id.*
[146] *Sea Hunt I*, 47 F. Supp. 2d at 690.
[147] *See id.*
[148] *See id.*
[149] *See id.* at 691.
[150] *See id.* at 691-92.
[151] *See Sea Hunt I*, 47 F. Supp. 2d at 692.
[152] *See id.*
[153] *Sea Hunt III*, 221 F.3d at 640.
[154] *Id.*

D. *The Decision of the Fourth Circuit*

On appeal, the Court of Appeals for the Fourth Circuit reversed in part and affirmed in part.[155] The Fourth Circuit affirmed the district court's ruling that Spain retained title to the *Juno* and that Sea Hunt is not entitled to a salvage award; however, the court reversed the district court's decision that Virginia held title to the *La Galga*.[156]

The Fourth Circuit began its opinion with an abandonment analysis.[157] Virginia and Sea Hunt argued that the ASA requires application of an "implied abandonment" standard for wrecks located in coastal waters, and that under such a standard, Spain has abandoned both shipwrecks.[158] The court held that since Spain has stepped forward and asserted ownership to the two shipwrecks, "express abandonment" is the correct standard to be applied.[159] The court then noted that the ASA does not define the critical term "abandonment," but added that nothing in the Act sets out that implied abandonment should be the standard when dealing with a situation where a sovereign asserts ownership over one of its own sunken vessels.[160] The court stated that the Act defined "abandoned shipwrecks" as those that "the owner has relinquished ownership rights with no retention" in an effort to support its argument that express abandonment was the correct standard.[161] The court reasoned that the language of the Act provides that a shipwreck is abandoned only where the

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[155] *Id.* at 638.

[156] *Id.*

[157] *See id.* at 640 (noting that in order for Virginia to acquire title to these wrecks, and in turn issue salvage permits, the ships must have been abandoned by Spain). States can gain title to abandoned shipwrecks under the ASA, but to trigger the ASA the wreck must be deemed abandoned. *See* discussion *supra* Parts I.E.1 and 2. The court recognized that if the shipwrecks were abandoned, then Sea Hunt would be entitled to control over them in accordance with the state-issued permits. *See Sea Hunt III*, 221 F.3d at 640.

[158] *Id.*

[159] *See id.* In reaching this conclusion, the court noted that *Columbus-America Discovery Group* called for such a standard and additionally noted that to adopt a lower standard, such as implied abandonment, would go beyond what the ASA requires and also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations. *See id.*

[160] *See id.*

[161] *Sea Hunt III*, 221 F.3d at 640 (citing 43 U.S.C. § 2101(b)).

owner relinquished ownership rights; and when an owner has come forward and asserted ownership rights, the court argued a finding of relinquishment is near impossible.[162] Therefore, the court argued that express abandonment was required.[163]

The Fourth Circuit continued its abandonment analysis by reviewing relevant case law.[164] The court noted that the Supreme Court in its recent *Brother Jonathan* decision declined to define abandonment but stated that "abandoned" under the ASA was defined the same as in admiralty law.[165] The court found that under admiralty law, abandonment might be inferred but that such an inference would be improper should the owner appear.[166] Sea Hunt and Virginia argued that other circuits have provided for an implied abandonment standard.[167] The Fourth Circuit, however, distinguished this case, finding that none of the other cases involved an original sovereign owner's claim to its shipwrecked vessel.[168]

Finally, the court argued that an express abandonment standard is further supported by Article X of the 1902 Treaty of Friendship and General Relations.[169] The court found that under the Treaty, Spanish vessels were granted the same immunities as similar vessels of the United States.[170] The court then pointed to Article IV, Section 3, of the United States Constitution, which states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[171] The court found that this Constitutional clause precludes an implied abandonment standard of federal lands and property because their disposition requires

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[162] *Id.* at 640-41.

[163] *See id.*

[164] *See id.* at 641-42.

[165] *See id.* at 641.

[166] *See Sea Hunt III*, 221 F.3d at 641. The Fourth Circuit cited one of its own earlier decisions, *Columbus-America Discovery Group*, as the basis for its conclusion. *See id.* at 639. The Court countered Sea Hunt and Virginia's assertion that *Columbus-America Discovery Group* is an anomaly by stating that the rule set forth in that case reflects well-established admiralty law doctrine and existing case law. *See id.* at 641-42.

[167] *See id.*

[168] *See id.*

[169] *See Sea Hunt III*, 221 F.3d at 642.

[170] *Id.*

[171] *See id.* (citing U.S. CONST. art. IV, § 3).

congressional action.[172] The court reasoned that the clause was also applicable for Spanish vessels.[173] The Fourth Circuit therefore ruled that an express abandonment standard was the proper standard to be applied in this case.[174]

The Fourth Circuit continued its analysis by addressing whether there was an express abandonment of the shipwrecks.[175] The court disagreed with the district court's interpretation of Article XX of the 1763 Definitive Treaty of Peace, and found that the plain language of that provision of the Treaty contains no evidence of express abandonment of the *La Galga*.[176] Specifically, the Fourth Circuit noted that Spain's cession of property in the Treaty was limited to all that Spain possesses "on the continent of North America."[177] The court asserted that Spain therefore did not cede possessions in the sea or seabed.[178] Moreover, the court pointed out that Article XX of the Treaty does not include any terms referring to shipwrecks; yet in other provisions of the Treaty, reference is made to ships and vessels.[179] Furthermore, the Fourth Circuit held that the language in Article XX of the Treaty, "on the continent," did not include coastal waters as Sea Hunt and Virginia argued it had.[180] Similar to the previously mentioned argument,[181] the Fourth Circuit stated that Article XX of the Treaty makes no mention of the term "coast," yet in another provision of the Treaty the term is explicitly used when granting French Canada to Great Britain.[182] Furthermore, in response to the language in Article XX that provides Spain ceded "every thing that depends on the said countries and lands," the court maintained that this cannot be interpreted to include shipwrecks.[183] The court supported that position by arguing that the eighteenth century understanding of

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[172] *See id.*
[173] *See id.*
[174] *See Sea Hunt III*, 221 F.3d at 643.
[175] *See id. at* 643-46.
[176] *See id.* at 643-44.
[177] *Id.* at 644.
[178] *See id.*
[179] *See Sea Hunt III*, 221 F.3d at 644.
[180] *See id.* at 645.
[181] *Id.* at 644; *see also supra* note 179 and accompanying text.
[182] *See Sea Hunt III*, 221 F.3d at 645.
[183] *See id.*

"everything that depends" refers not to shipwrecks but rather "dependencies" such as nearby islands.[184] Finally, the Fourth Circuit drew attention to the clause in Article XX, "his Catholic Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things."[185] The court stated that this clause contains no time limit, as did some of the other clauses in the Treaty.[186] In sum, the Fourth Circuit concluded that Article XX of the Definitive Treaty of Peace does not contain clear and convincing evidence of express abandonment of the *La Galga*.[187]

In an attempt to further support that conclusion, the Fourth Circuit also noted that when parties to a treaty agree on its interpretation, the court must, absent extraordinary contrary evidence, defer to that interpretation.[188] The court went one step further and stated that even if express abandonment were not the controlling test in this case, in light of the circumstances surrounding the *La Galga*, a finding of implied abandonment would be improper.[189] Thus, the Fourth Circuit reversed the district court and held that Spain retains title to the *La Galga*.[190]

As for the *Juno*, the Fourth Circuit agreed with the district court's holding that it was not expressly abandoned under the 1819 Treaty and affirmed the district court's ruling that title to the *Juno* remains with Spain.[191] The last issue the Fourth Circuit addressed was whether Sea Hunt was entitled to a salvage award for its salvage efforts on the *Juno*.[192] The court stated that the owner of a vessel has the right to refuse unwanted salvage.[193] The court agreed with the district court's finding that Sea Hunt knew the *Juno* was a Spanish ship and that Spain might assert a claim of ownership and decline

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[184] *See id.*

[185] *Id.* at 645-46 (quoting Definitive Treaty of Peace, *supra* note 130, at art. XX).

[186] *Id.* at 646.

[187] *Sea Hunt III*, 221 F.3d at 646.

[188] *Id.* (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999)).

[189] *See id.* at 647.

[190] *See id.*

[191] *See id.* at 643 n.1.

[192] *See Sea Hunt III*, 221 F.3d at 647-48 n.2.

[193] *Id.*

salvage.[194] Thus, "[b]ecause Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on [*Juno*], Sea Hunt can not be entitled to any salvage award."[195]

III. ANALYSIS

A. *The Fourth Circuit's Standard of Abandonment Analysis*

This Part discusses the misguidance of the *Sea Hunt III* decision and argues that under traditional admiralty law, when an owner comes forward and asserts ownership to its shipwreck, abandonment by inference is not improper. Moreover, this Part argues that the Fourth Circuit diverged from the weight of authority when it affirmed the district court's denial of a salvage award.

The Fourth Circuit concluded that because Spain asserted ownership to the shipwrecks, express abandonment is the governing standard.[196] The court further reasoned that to allow an implied abandonment standard in such a case would go beyond what the ASA requires.[197] The Court sought to justify its position by noting that even though the ASA does not define abandonment, nothing in the Act indicates that implied abandonment should be the standard when a sovereign has stepped forward and asserted ownership to its shipwreck.[198] The court pointed out that other courts have held that the ASA "did not affect the meaning of 'abandoned.'"[199] The court also noted that, according to the Supreme Court, "the meaning of 'abandoned' under the ASA conforms with its meaning under

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[194] *Id.*

[195] *Id.* (quoting Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels, No. 2:98cv281, 1999 U.S. Dist. LEXIS 21752, at *13 (E.D. Va. June 25, 1999) [hereinafter *Sea Hunt II*].

[196] *See id.* 640-43.

[197] *See Sea Hunt III,* 221 F.3d at 640-41.

[198] *See id.* at 640.

[199] *Id.* at 641 (quoting *Fairport III,* 177 F.3d at 499).

admiralty law."[200] The Fourth Circuit then added that "[t]he Supreme Court never suggested that by conferring title to the states the ASA somehow altered the traditional admiralty definition of abandonment."[201] The court argued that under traditional admiralty law, when "an owner"[202] comes forward and asserts ownership of its vessel, express abandonment is the proper standard.[203] The court continued by contending that an implied abandonment standard is permitted is some situations, but not when *an owner* appears and asserts ownership.[204]

The Fourth Circuit's conclusion that an implied abandonment standard is improper under traditional admiralty law when an "owner appears" is misleading. The court relies heavily on its earlier decision in *Columbus-America Discovery Group* to arrive at this standard of abandonment; however, the weight of traditional admiralty law recognizes that abandonment may be found where circumstances give rise to such an inference.[205] What remains unsettled is whether

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[200] *Id.* at 641 (quoting *Brother Jonathan III*, 523 U.S. at 508); *see supra* notes 90-98 and accompanying text.

[201] *Id.*

[202] *Sea Hunt III*, 221 F.3d at 641. There is an important distinction between using the term "an owner," which may include a private owner, and using the term a "sovereign owner," which will become apparent in the discussion. The court uses both terms throughout its analysis in a misleading way.

[203] *See id.* (citing *Columbus-America Discovery Gr.*, 974 F.2d 450).

[204] *See id.* (citing *Columbus-America Discovery Gr.*, 974 F.2d at 467-68).

[205] *Compare Columbus-America Discovery Gr.*, 974 F.2d at 464-65 (holding that when an owner appears and asserts his ownership interest, abandonment must be proven by clear and convincing evidence such as express declaration of abandonment) *with Fairport III*, 177 F.3d at 499-500 (rejecting a doctrine of express abandonment and holding that abandonment may be inferred for vessels formerly owned by private parties); United States v. Steinmetz, 973 F.2d 212, 222-23 (3d Cir. 1992) (recognizing that an inference of abandonment can sometimes be found with non-use of private property); *Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065 (stating that abandonment may be inferred when circumstances give rise to such an inference, for instance, when a vessels is "so long lost that time can be presumed to have eroded any realistic claim of original title"); *Treasure Salvors III*, 640 F.2d at 567 (holding that where property has been lost for a very long time, an original owner may be stripped of title and that title vests by occupancy in the one who discovers it and reduces it to his or her possession); Moyer v. Wrecked & Abandoned Vessel, Known as *Andrea Doria*, 836 F. Supp. 1099, 1105 (D. N.J. 1993) ("Abandonment may be inferred from circumstantial evidence . . . . Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon."); Chance v. Certain Artifacts Found & Salvaged from the *Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984) ("[I]nference of abandonment may arise from lapse of time and nonuse of the

such an inference of abandonment is permitted when one of the circumstances is that an owner appears and asserts its ownership interest in a historic wreck. In virtually all of the cases involving ancient shipwrecks, no prior owner has appeared. Indeed, the Sea Hunt dispute marked the first time Spain has ever stepped forward and asserted an ownership interest to one of its sunken vessels. In the few cases where an owner has appeared, other than the Fourth Circuit's own decision in *Columbus-America Discovery Group*,[206] courts maintain that abandonment by inference is permitted if the circumstances warrant it.[207]

For example, in *Columbus-America Discovery Group*, which involved parties stepping forward and asserting claims of ownership, the district court stated that "whether property has been abandoned is a question of intent, which may be inferred from all of the relevant facts and circumstances."[208] The court went on to state that "[i]n determining the question of whether property has been abandoned, consideration must be given to the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery and all other facts and circumstances."[209]

In *Zych v. The Unidentified, Wrecked and Abandoned Vessel*, a ship which sank in 1860 was discovered by a salvor who attempted to claim finder status and thus acquire title to it under the law of finds.[210] However, this claim of ownership was disputed by the Lady Elgin Foundation who asserted it had become the owner of the shipwreck pursuant to an agreement with CIGNA Property & Casualty Insurance Company.[211] Lady Elgin alleged that CIGNA had transferred to

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property."), *aff'd. mem.*, 775 F.2d 302 (11th Cir. 1985); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960) (holding that lapse of time and nonuse may give rise to an inference of abandonment).

[206] This is to be contrasted with the district court's decision in *Columbus-America Discovery Gr.*, 742 F. Supp. 1327 (E.D. Va. 1990).

[207] *See id.*; Zych v. The Unidentified, Wrecked & Abandoned Vessel, 755 F. Supp. 213 (N.D. Ill. 1990).

[208] 742 F. Supp. at 1328-29, 1335.

[209] *Id.*

[210] *See Zych*, 755 F. Supp. at 213-14.

[211] *See id.* at 214.

them the ownership interests in the wreck.[212] Noting that the case hinged on whether the ship was abandoned, the court sought to clarify the standard under such circumstances.[213] The court stated:

> Abandonment is the voluntary relinquishment of one's rights in a property. It occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." It must be voluntary, with a positive intent to part with ownership, and without coercion or pressure. To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. Abandonment may be inferred from all of the relevant facts and circumstances. A finding of abandonment must be supported by strong and convincing evidence, but it may, and often must, be determined on the basis of circumstantial evidence.[214]

Thus, in *Zych* and *Columbus-America*, two district courts followed the explicit principle announced repeatedly by the weight of admiralty authority: abandonment may be inferred when circumstances give rise to such an inference.[215] An owner suddenly appearing to assert ownership over a historic vessel is a circumstance to be taken into consideration along with other recognized circumstances including non-use, lapse of time, location of the wreck, and efforts by the owner to recover the vessel. Indeed, the circumstance of an owner appearing might result in a higher burden on the salvor to demonstrate abandonment by inference. It does not, however, trigger a per se rule, as the Fourth Circuit held in *Sea Hunt III*, that there must be an express finding of abandonment where an owner appears. The great weight of authority has not adopted any bright-line rules for findings of abandonment—its approach has always been, and continues to be, based upon the totality of the circumstances.[216]

The Fourth Circuit improperly states in *Sea Hunt III* that traditional admiralty law does not permit an implied abandonment standard when an owner appears. Although the vast majority of courts allowing abandonment by inference

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[212] *See id.*
[213] *See id.*
[214] *Id.*
[215] *See* cases cited *supra* note 205.
[216] *Id.*

have not yet been faced with an appearance by an owner claiming ownership rights to its shipwreck, nothing suggests that those courts would be opposed to such an abandonment standard as the Fourth Circuit mistakenly concludes. To the contrary, the weight of precedent indicates courts would permit abandonment by inference if all the circumstances taken into consideration warrant it.[217] The Fourth Circuit's requirement of express abandonment has even been openly criticized as a departure from the traditional admiralty law analysis of abandonment.[218]

In an attempt to further distinguish this weight of authority, the court argues that Sea Hunt and Virginia are unable to point the court to any case applying an implied abandonment standard where a "sovereign owner"[219] has come forward and asserted ownership to its property. Here, the court has a valid point. There is some authority for an express abandonment standard when a "sovereign owner" asserts ownership to its vessel.[220] The ASA Guidelines explicitly address the abandonment standard to be afforded to foreign sovereign vessels:

> Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party.[221]

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[217] *See id.*

[218] *See supra* note 24 and accompanying text. In rejecting the holding of the Fourth Circuit in *Columbus-America,* which required an express renunciation of ownership in order to establish abandonment, the *Fairport III* court stated that "[r]igid adherence to a doctrine requiring express abandonment would require courts to 'stretch [] a fiction to absurd lengths.' " 177 F.3d at 500. Moreover, the court in *Brother Jonathan II* stated that when the Fourth Circuit held that abandonment can only be found by express renunciation of ownership it introduced a significant modification into maritime law. 102 F.3d 379, 388 (9th Cir. 1996) *aff'd in part, vac. in part,* 523 U.S. 491 (1998).

[219] This is to be contrasted with the court's use of the term "an owner," which could include private owners. *See supra* note 202 and accompanying text.

[220] *See* United States v. California, 332 U.S. 19, 27 (1947) (holding that Art. IV, § 3, cl. 2 of the Constitution holds that the United States cannot abandon its own property except by explicit acts); *Steinmetz,* 973 F.2d at 222 (holding that the United States confederate warship *Alabama* can only be abandoned by an explicit act); *see also* Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116, 50,121 and 50,124 (1990) [hereinafter ASA Guidelines].

[221] ASA Guidelines, *supra* note 220, at 50,121.

Moreover, in a 1980 letter by James H. Michel, Deputy Legal Advisor of the Department of State, responding to a request for the Department's views on the ownership rights acquired, if any, by the United States to Japanese vessels sunk by the United States during World War II, Michel wrote:

> The practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time. . . . It is clear that under well-established State practice, States generally do not lose legal title over sunken warships through the mere passage of time in the absence of abandonment. . . . Although abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned.[222]

However, it is worth noting that even in the case of a "sovereign owner" stepping forward and claiming ownership, the law is still somewhat unsettled when the sovereign is not the United States. As the Fourth Circuit pointed out, there has been no case yet permitting an inferential abandonment standard where a claim of ownership was made by a "sovereign owner." Some circuits have come close to announcing a position but have avoided doing so. For example, the Sixth Circuit in *Fairport III* expressly limited its holding that implied abandonment is permitted for vessels previously owned by "private parties" and it declined to express a view as to vessels owned by a sovereign.[223] In *Martha's Vineyard Scuba Headquarters*, the First Circuit held that a vessel may be "so long lost that time can be presumed to have eroded any realistic claim of original title," and it went on to say that after the action in rem was brought against the ship and its contents, "no person or firm appeared to assert any overall claim of ownership."[224] But the court did not address whether the inferential abandonment standard would have applied had a sovereign appeared to assert an ownership claim.[225] Likewise, other circuits have not spoken precisely on the issue. Even the

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[222] MATION NASH LEICH, 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW at 1004–05 (quoting a memorandum by James H. Michel, Deputy Legal Advisor of the Department of State).

[223] 177 F.3d 491, 500 (6th Cir. 1999).

[224] 833 F.2d 1059, 1065 (1st Cir. 1987).

[225] *See id.*

1980 State Department letter,[226] stating that it has been the practice of the United States and other nations in recent years to reject the idea that there can be abandonment by inference of warships by the long passage of time, still acknowledges in its conclusion that "abandonment by inference may be implied under some circumstances."[227] The closest corollary to the judicial treatment of foreign shipwrecks with respect to the applicable abandonment standard comes from *United States v. Steinmetz*[228] and *United States v. California*,[229] which, taken together, establish how shipwrecks of the sovereign, the United States, are to be treated.[230] Moreover, although the ASA is silent on the issue, the ASA Guidelines do provide some guidance.[231]

The Fourth Circuit would have been more accurate had it stated that an implied abandonment is improper should a "sovereign owner" come forward and assert ownership, rather than stating that should "an owner" appear and claim ownership over the property, abandonment by inference is not permitted under admiralty law. The term "an owner" indicates a private as well as a sovereign owner and, under admiralty law, the distinction is important. In determining the precedential value of the Fourth Circuit's decision in *Sea Hunt III*, it is more accurate to state that an express abandonment standard is proper when a "sovereign owner," as opposed to simply "an owner," has stepped forward and asserted ownership interests over its shipwreck.

As it turns out, the Fourth Circuit was able to offer an additional factor in the *Sea Hunt III* case requiring the application of an express abandonment standard. The court pointed out that Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain requires an express abandonment standard.[232] Article X provides, "[i]n cases of shipwreck . . . each party shall afford to the vessels of the other . . . the same assistance and protection

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[226] *See supra* Part III.A.
[227] LEICH, *supra* note 222, at 1004–05.
[228] 973 F.2d 212 (3d cir. 1992).
[229] 332 U.S. 19 (1947).
[230] *See* cases cited *supra* note 220.
[231] *See supra* notes 220-21 and accompanying text.
[232] *See Sea Hunt III*, 221 F.3d at 642.

and the same immunities which would have been granted to its own vessels in similar cases."[233]

The court noted that the language of the treaty requires that imperiled Spanish vessels shall receive the same immunities given to similarly situated vessels of the United States.[234] The court then presented an analysis of the immunities conferred upon U.S. vessels and concluded that they may only be abandoned by an "express, unambiguous, and affirmative act."[235] Thus, the Fourth Circuit held that under the terms of the 1902 Treaty, requiring that imperiled Spanish vessels are to receive the same immunities given to similarly situated vessels of the United States, Spain can only abandon its vessels by express renunciation.[236] Having determined that an express abandonment standard will govern, the court then addressed whether the *La Galga* and the *Juno* had been expressly abandoned.[237] After concluding that neither ship had been expressly abandoned, rendering the ASA and the law of finds inapplicable, the court briefly considered the alternative admiralty action—Sea Hunt's salvage award claim.[238]

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[233] Treaty of Friendship and General Relations, July 3, 1902, U.S.—Spain, 33 Stat. 2105, 2110-11.

[234] *See Sea Hunt III*, 221 F.3d at 642.

[235] *Id.* In reaching this conclusion the court referred to art. IV, § 3 of the Constitution which states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3. The court concluded that this article of the Constitution precludes a finding of implied abandonment of federal lands and property and instead requires some congressional action for dispositions of federal property. *See Sea Hunt III*, 221 F.3d at 642. The court also noted that the Third Circuit has held that the United States cannot abandon its own property except by explicit acts. *See id.* (citing *Steinmetz*, 973 F.2d at 222). Moreover, the court argued that the Supreme Court has recognized that art. IV, § 3 of the Constitution holds that the Unites States cannot abandon its own property except by explicit acts. *See id.* (citing *California*, 332 U.S. at 27).

[236] *See Sea Hunt III*, 221 F.3d at 643.

[237] *See id.* at 643.

[238] *See id.* at 647-48.

B. *The Fourth Circuit's Denial of a Salvage Award*

Here again, the Fourth Circuit diverged from the weight of authority when it affirmed the district court's denial of a salvage award for Sea Hunt's salvage services on the *Juno* and held:

> It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the *JUNO* was a Spanish ship and that Spain might make a claim of ownership and decline salvage. . . . Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on *JUNO*, Sea Hunt cannot be entitled to any salvage award.[239]

The Fourth Circuit failed to recognize that all of the necessary elements for a valid salvage claim were present: there was a voluntary and successful salvage of the marine periled *Juno*.[240]

First, the *Juno* was in marine peril. It is well established that shipwrecks, and/or their artifacts, still lying at the bottom of the sea are in marine peril.[241] Second, Sea Hunt had also performed successful salvage services on the *Juno*. Sea Hunt had successfully salvaged two anchors, a cannon, and several coins during its attempt to positively identify the shipwreck as the *Juno*.[242] Sea Hunt had successfully salved part of the shipwreck believed to be the *Juno* and its efforts had contributed to its eventual preservation.[243] Finally, Sea Hunt's salvage services were voluntary as it had no duty or obligation, legal or otherwise, to provide these services.[244]

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[239] *Id.* at n.2.

[240] *See supra* note 34 and accompanying text.

[241] *See supra* notes 35-37 and accompanying text for a discussion on what constitutes marine peril.

[242] *See* Joint Opening Brief of Appellees Commonwealth of Virginia and Sea Hunt, Inc. at 55, *Sea Hunt III* (No. 99-2035) [hereinafter Joint Opening Brief].

[243] *See supra* notes 38-40 and accompanying text for a discussion on the requirements of successful salvage; *see also* The Annie Lord, 251 F. 157, 159 (D. Mass. 1917) (stating that "It is not necessary, in order to establish a claim to salvage, that a salvor should actually complete the work to save property at risk. . . . It is sufficient if he endeavors to do so, and his efforts have a causal relation to the eventual preservation of it.").

[244] *See supra* notes 41-46 and accompanying text for a discussion on the what constitutes voluntary salvage services.

The Fourth Circuit did not discuss whether Sea Hunt had established the existence of these three necessary elements. Rather, it affirmed the district court's ruling that a salvage award was not permitted because Spain had properly refused the salvage activity.[245] Whether Spain, under the law of salvage, had properly refused Sea Hunt's salvage activity was a major point of contention between the parties. The Fourth Circuit diverged from majority view in deciding this issue.

Sea Hunt argued that "only owners in actual possession of vessels may refuse salvage."[246] Sea Hunt noted that in cases where salvage has been properly refused the owner was in actual possession of the vessel and could therefore respond to the marine peril.[247] However, Sea Hunt argued that when the owner is not in actual possession and consequently cannot respond to the marine peril, salvage cannot be refused.[248] Spain, on the other hand, argued that under traditional admiralty law principles, when the owner of a vessel unequivocally rejects salvage services, the owner has a broad right to refuse unwanted salvage.[249] Contending that a "doctrine of rejection," giving owners or persons with authority the right to communicate refusal, has been embraced by American courts of admiralty, Spain argued that it had the right to refuse Sea Hunt's salvage activity despite its lack of actual possession of the *Juno*.[250]

The district court sided with Spain on this issue.[251] However, whether an owner can reject salvage services when not in actual control or possession of the marine periled vessel is unsettled. Most traditional admiralty law cases have dealt with owners who were in actual possession when rejecting salvage services.[252] Legal disputes regarding the rejection of salvage services on shipwrecks did not arise until the present

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[245] *See Sea Hunt III*, 221 F.3d at 647.

[246] Joint Opening Brief, *supra* note 242, at 49.

[247] *See id.*

[248] *See id.* at 49-50.

[249] *See* Answering and Reply Brief of Intervenor—Appellant and Cross-Appellee The Kingdom of Spain at 41-42, *Sea Hunt III* (No. 99-2035) [hereinafter Answering and Reply Brief].

[250] *See id.*

[251] *See Sea Hunt II*, 1999 U.S. Dist. LEXIS 21752, at *4-5.

[252] *See id.*

time because the technology to locate shipwrecks and bring them to the surface did not exist.[253]

The weight of authority holds that owners of vessels sometimes have the right to refuse salvage but, in order to do so, the owner must be in actual control and possession of the ship and the vessel cannot be in a state of peril.[254] However, there seems to be a developing body of authority directly in conflict with this majority position. Most recently, the Eleventh Circuit reversed the district court in *Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked & Abandoned Aircraft* and held that "the law of salvage [permits] the owner of a vessel in marine peril to decline the assistance of others so long as only the owner's property interests are at stake."[255]

Although the Fourth Circuit sided with the minority position on this salvage law issue by holding that Spain could refuse salvage despite the fact that it was not in actual control or possession of the marine periled *Juno*, another circuit, following the majority view, would likely find that Sea Hunt had a valid salvage claim.[256] Thus, the question left

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[253] *See* Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 195 (Apr. 1999).

[254] *See supra* notes 44-46 and accompanying text; *see also* The Laura, 81 U.S. 336, 344-45 (1871); The Barque Island City, 66 U.S. 121, 128 (1861); MARTIN J. NORRIS, BENEDICT ON ADMIRALTY: SALVAGE § 136 (rev. 7th ed. 1999); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW: SALVAGE § 16-1 (2d. ed. 1994); Sweeney, *supra* note 253, at 193-95. This view can also be found in jurisprudence as recent as July 1999. *See* Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked & Abandoned Aircraft, 54 F. Supp. 2d 1172, 1181 (S.D. Fla. 1999) (holding that even if the United States Navy still owns its historic aircraft it could not refuse salvage on it where the property was in marine peril and the owner has not made adequate provisions for a rescue). The court also noted that numerous courts have held that that any owner may not refuse salvage services if marine peril exists. *See id.* at 1180.

[255] Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked & Abandoned Aircraft, 218 F.3d 1255, 1262 (11th Cir. 2000); *see also* Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 901-02 (5th Cir. 1983) (noting that a "salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel").

[256] In addition to meeting the three necessary elements for a valid salvage claim, a voluntary and successful salvage of the marine periled *Juno*, Spain under the majority view did not properly refuse salvage services. Spain has not been in control or possession of the *Juno* since its sinking in 1802. Moreover, a risk to the property does exist independent of one that could be caused by the vessels owner, the risk of marine peril. Spain is not in control or possession of the Juno and thus is in no position to respond to the marine peril itself and Spain, at the time of the salvage services were rendered, had made no provisions for rescuing the Juno from such peril. Thus, under the law of salvage, Spain could not lawfully refuse salvage services on the Juno. *See*

unanswered by the Fourth Circuit's decision in *Sea Hunt III* is whether Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain will preclude a salvage award for salvage services rendered on its sovereign vessels.[257] This is an important question because an estimated 600 Spanish vessels were lost in the coastal waters of the United States, an area frequently subject to salvage operations.[258]

Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain governs how Spain's sovereign shipwrecks are to be treated.[259] As the Fourth Circuit established, Article X requires that imperiled Spanish vessels receive the same immunities given to similarly situated vessels of the United States.[260] Indeed, the Fourth Circuit's analysis of the immunities conferred upon U.S. vessels led it to conclude that Spain must expressly abandon its sovereign vessels.[261] The answer to the question of whether a salvor can bring a salvage award action for salvage services on a Spanish sovereign vessel thus lies in what immunities are conferred upon United States vessels with respect to salvage award claims.

The United States, by statute, has waived its sovereign immunity with respect to salvage services rendered on its vessels.[262] Section 781 of the Public Vessels Act provides:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.[263]

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authority cited *supra* note 254.

[257] This question is left unanswered by the Fourth Circuit because the court did not have to deal with it since it held that Spain had properly refused salvage services.

[258] William J. Broad, *Court Ruling on Spanish Frigates Foils Modern-Day Treasure Hunt*, N.Y. TIMES, July 31, 2000, at A1.

[259] *See* Treaty of Friendship and General Relations, *supra* note 233.

[260] *See Sea Hunt III*, 221 F.3d at 643.

[261] *Id.*

[262] *See* 46 U.S.C. § 781 (2000); *see also* Helgesen v. United States, 275 F. Supp. 789, 790 (S.D.N.Y. 1966) (stating that suits based on admiralty claims may be brought against the United States under the various statutes including the Public Vessels Act).

[263] 46 U.S.C. § 781.

Consistent with the Public Vessels Act, the United States has allowed salvors to maintain salvage award actions for salvage services on public vessels of the United States. For example, in *Petition of United States*, suit was brought under the Public Vessels Act for salvage services rendered on a Coast Guard vessel.[264] The court held that a claim under the law of salvage could be presented on proper presentation of the issues.[265] Similarly, in *Lago Oil & Transport Co. v. United States*, an action was permitted against the United States for salvage services rendered on a tanker owned by the United States, a public vessel.[266] Thus, as case law demonstrates, a salvage award action may be brought against the United States. Accordingly, by extension of the same immunities given to imperiled Spanish vessels as those that are given to such vessels of the United States, Sea Hunt would not have been precluded under Article X of the 1902 Treaty of Friendship and General Relations from bringing a salvage award claim.

Even an argument by Spain that the Foreign Sovereign Immunities Act ("FSIA")[267] would bar Sea Hunt's salvage claim would lack merit.[268] Section 1605(a)(1) provides that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication. . . ."[269] Although this clause has been narrowly interpreted by courts, which require strong evidence that a foreign state has intended to waive its sovereign immunity, Spain has provided strong evidence of its intention to waive its

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[264] *See* 216 F. Supp. 775, 775 (D. Or. 1963).

[265] *See id.* at 784.

[266] *See* 218 F.2d 631 (2d Cir. 1955).

[267] *See* 28 U.S.C. §§ 1602-1611 (1994).

[268] The FSIA codified the principal of sovereign immunity, recognized by Chief Justice Marshall in the 1812 case *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812). The Chief Justice in that case held that sovereign nations are not subject to judicial process without their express consent. *See id.*; *see also* Answering and Reply Brief of Intervenor – Appellant and Cross-Appellee The Kingdom of Spain at 35. The FSIA's implicit waiver clause recognizes the principal announced by Chief Justice Marshall in *The Schooner Exchange*, that foreign sovereign immunity can be waived. *See* 28 U.S.C. § 1605(a)(1) (2000).

[269] 28 U.S.C. § 1605(a)(1).

sovereign immunity.[270] Such evidence is found in the 1902 Treaty, where Spain unequivocally and expressly waived its sovereign immunity with respect to its imperiled vessels.[271] It did so when it agreed that its imperiled vessels are to receive the same protections and immunities given to similarly situated vessels of the United States.[272] Thus, if the United States were to waive its sovereign immunity, as it later did for actions based on salvage services rendered on its public vessels, Spain understood that its immunity would also be waived.[273] Therefore, under Article X of the 1902 Treaty of Friendship and General Relations, Spain has, in so much as the United States has, waived its sovereign immunity for actions brought against it for salvage services rendered on one of its sovereign vessels.

CONCLUSION

The vast developments in undersea technology are opening up the wonders beneath the sea to the peering eyes of the world. As technology continues to develop, one can easily imagine that even a basketball at the bottom of the deep sea can be located. This technology has allowed salvors to locate historic shipwrecks once thought lost forever; but while many of these discoveries preserve a piece of history, they also disturb it. Indeed, legal battles have ensued over whether salvors can and/or should disturb these shipwrecks, and the need to protect historic shipwrecks as cultural resources was a major factor in passing the ASA.[274]

Each shipwreck presents a complicated, and often unique, set of legal issues. Many of those legal issues have been addressed over the years and a body of admiralty law has evolved concerning legal rights over historic shipwrecks. This body of admiralty law, together with the passage of the ASA, has provided many of the answers to the legal questions that

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[270] *See e.g.*, Corporacion Mexicana De Servicios Maritimos v. The M/T RESPECT, 89 F.3d 650 (9th Cir. 1996); Rodriguez v. Transnave Inc., 8 F.3d 284 (5th Cir. 1993); *see also* Answering and Reply Brief, *supra* note 249, at 40.

[271] *See* Treaty of Friendship and General Relations, *supra* note 233.

[272] *See Sea Hunt III*, 221 F.3d at 643.

[273] *See supra* notes 259-66 and accompanying text.

[274] *See supra* Part II.E.

arise under the laws governing shipwrecks. However, as the *Sea Hunt III* case illustrates, there are many questions still in dispute or left unanswered.

First, a split in the circuits has developed as to under what circumstances abandonment of a shipwreck may be implied.[275] Adding to that confusion, the question of whether abandonment by inference is improper when "an owner" appears and asserts ownership to its long lost shipwreck is now ripe for dispute due to the Fourth Circuit's opinion in *Sea Hunt III*. The weight of traditional admiralty law suggests that abandonment by inference, under the right circumstances, would not be improper even though "an owner" appears and asserts ownership to its vessel.[276] However, when the owner is a "sovereign," the sparse existing authority does indicate that abandonment by inference under such a circumstance would be improper. Still, questions involving the standard of abandonment to be applied when owners appear, both private and sovereign, are in the initial stages of development and are sure to spark legal battles in the coming years, especially given the Fourth Circuit's *Sea Hunt III* decision.

Second, the question of whether an owner not in actual control or possession of a periled vessel can refuse salvage has currently produced conflicting authority as well.[277] The Fourth Circuit sided with the minority position on this issue, and in doing so increased the weight of authority taking the position that an owner need not be in actual possession or control to reject salvage services as the owner has a broad right to refuse such services. This increasingly developing split of authority is sure to produce legal disputes.

Finally, if an owner has a valid salvage claim on a sovereign vessel of Spain, does the 1902 Treaty of Friendship and General Relations between the United States and Spain preclude the salvor from bringing a salvage award action? Although the Fourth Circuit did not have to face this question, since it held that Spain had properly refused Sea Hunt's salvage activities, with hundreds of Spanish shipwrecks still lying at the bottom of the sea in the coastal waters of the

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[275] *See supra* notes 24–25 and accompanying text.
[276] *See supra* Part III.A.
[277] *See supra* Part III.B.

United States, this question is sure to arise in the future. An analysis of the 1902 Treaty indicates that Spain has waived its sovereign immunity with respect to salvage actions brought against it for salvage services rendered on its sovereign vessels.[278]

In addition to furthering the split in authority over the proper standard of abandonment to be applied in various contexts and how an owner can suitably refuse salvage activities, the Fourth Circuit's *Sea Hunt III* decision also has other effects. Namely, the decision will likely discourage future salvage operations. Many salvors will view this decision as a threat to their glorious days of treasure hunting. Salvors now run the risk of spending considerable amounts of time and money locating and salvaging shipwrecks without the possibility of any profit. Additionally, the possibility that a salvor will not even receive compensation by way of a salvage award for the time and money it spent, thus putting them at risk of not even breaking even, has the potential of further squashing any remaining profit incentive. Without that profit incentive, many salvors will no longer engage in these salvage expeditions and, consequently, society will lose out on the benefits of recovering historical artifacts.[279]

By recovering historic objects a piece of history is preserved. Historic shipwreck artifacts provide a portal to the cultures of the past, a portal that facilitates an understanding and preservation of past cultures. Indeed, "the past . . . plays an important role in the present [because] we use the past as an orientation to our own lives."[280] Through the preservation and examination of historic shipwreck artifacts, we are able to study human civilization—in many instances of cultures that have vanished.[281] Shipwrecks allow us to study "a lost dimension of history: man's encounter with the sea and the role which this has played in the development of human

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[278] *See supra* Part III.B.

[279] I say "many" and not "all" in recognition that some salvors may endeavor in such expeditions for reasons beyond the potential for profit. Some salvors may undertake such operations in an effort to preserve historical and archaeological objects and information.

[280] *See* PETER THROCKMORTON, THE SEA REMEMBERS: SHIPWRECKS AND ARCHAEOLOGY FROM HOMER'S GREECE TO THE REDISCOVERY OF THE TITANIC 226 (1996).

[281] *See id.* at 9.

civilization."[282] Shipwrecks provide this cultural glimpse because they often contain "an entire cross section of life 'frozen' intact in time,"[283] and preservation of culture is important given the increasing homogeneity of cultures in our modern world.

Yet, while there are obvious historical and cultural benefits to promoting salvage expeditions, there are also legitimate concerns. Many believe, as did Spain in *Sea Hunt III*, that these historic shipwrecks are maritime graves of the brave souls who went down with the ship. As maritime graves, the sentiment exists that these wrecks should not be explored or exploited. The concern also exists, as argued by the United States, that the United States has thousands of lost vessels that it too would like other countries and parties to treat as honored maritime graves.[284] Additionally, the call for international cooperation is becoming increasingly important as the vast advancements in technology increase the frequency and ease of salvaging sunken ships. The stage for such cooperation was set in *Sea Hunt III*. Indeed, the call from Spain to recognize the *La Galga* and the *Juno* as maritime graves and the first ever request from Spain for international cooperation, which the United States sought to comply with, likely played a role in the Fourth Circuit's willingness to diverge from traditional admiralty law.

Kevin Berean[†]

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[282] *Id.* at 7.

[283] *Id.* at 10.

[284] *See* Broad, *supra* note 258, at A1.

[†] J.D. Candidate, Brooklyn Law School, 2002; Master of Industrial and Labor Relations, Cornell University, 1997; B.A. in Communications, State University of New York at Buffalo, 1996. For teaching me how to undertake every endeavor with dignity and integrity, I dedicate this Comment to my lovely wife, Jeanine Dames.